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Supreme Court, U.S.
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No. 02-510

IN THE

Supreme Court of the United States

SALLY FERNANDES,

Petitioner,

v.

VIACOM, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

CERTAIN RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of the case presented for review, the named plaintiff adequately represented the class as required by the Due Process Clause of the United States Constitution.

RULE 29.6 STATEMENT

No publicly-held corporation owns more than 10% of the stock of Respondent Viacom Inc. ("Viacom"). National Amusements, Inc. is a closely-held corporation that beneficially owns approximately 68% of Viacom's Class A Common Stock (voting stock) and approximately 11% of Viacom's Class A Common Stock and Class B Common Stock (non-voting stock) on a combined basis. Respondent Infinity Broadcasting Corporation ("Infinity") is a wholly-owned subsidiary of Viacom.

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STATEMENT OF THE CASE

Petitioner Sally Fernandes asks this Court to review a factual determination made by the Delaware Court of Chancery and affirmed by the Supreme Court of Delaware—*i.e.*, that the lead plaintiffs and their counsel adequately represented a class of stockholders in settling claims challenging Viacom's tender offer for the shares of Infinity that it did not already own. Respondents respectfully request that this Court deny the petition for writ of certiorari.

Background—The Transaction and the Class Actions.

On August 15, 2000, following Viacom's announcement that it would offer 0.564 shares of its Class B common stock for each share of Infinity's common stock, plaintiff Eugenia Gladstone Vogel filed in the Delaware Court of Chancery one of eleven putative class action lawsuits seeking to enjoin Viacom's acquisition of the Infinity shares. Pet. Ap. A at 2a. None of those lawsuits was filed by petitioner, who did not own shares of Infinity at the time. On August 31, 2000, the Court of Chancery consolidated the eleven class actions under the first-filed action brought by plaintiff Vogel, and appointed the law firms of Milberg Weiss Bershad Hynes & Lerach, LLP and Abbey Gardy & Squiteri LLP as co-lead counsel. Resp. Br. App. A.

In September and October of 2000, plaintiff's co-lead counsel conducted document discovery and engaged a financial advisor to assist them in analyzing the fairness of the proposed acquisition to the members of the class. In addition, co-lead counsel discussed with Viacom's counsel a possible settlement of the consolidated class action if the exchange ratio were increased. On October 30, 2000, the parties reached an agreement in principle to settle the consolidated stockholder action based upon an increase in the exchange ratio. The agreement was subject to, among other things, completion of discovery by class counsel confirming

the fairness of the settlement and approval of the settlement by the Court of Chancery.

The Petitioner Purchased Infinity Stock After the Class Actions Were Settled.

On November 17, 2000—*after* the parties had agreed to settle the consolidated class actions based upon an increase in the exchange ratio, *after* the settlement was of public record, and *after* Viacom and Infinity announced that they had executed a definitive merger agreement—petitioner's son purchased 25 shares of Infinity common stock for an account that he jointly maintained with petitioner, his mother. Nearly two months later, on January 11, 2001, petitioner's counsel moved to intervene in the consolidated class action for the purpose of objecting to the settlement. Pet. at 3. No other shareholder objected to the settlement.

The Courts Below Found That The Class Representative Was Adequate.

On September 25, 2001, following notice to the class, the Chancellor held a hearing on the proposed settlement. Petitioner's counsel submitted a brief, appeared at the hearing, and submitted oral argument in opposition to the settlement and the fee petition presented by co-lead counsel. At the conclusion of the hearing, the Chancellor ruled that the consolidated action met the requirements for class certification, specifically noting that the adequacy of representation requirement had been met:

> Although initially challenged, I think to my satisfaction, from the affidavits being filed, there is no question about their adequacy. There is no indication in the record of any conflict that would disable them or disqualify them from being adequate representatives. Likewise, I say the same for counsel to the class.

Petition, Ap. C at 23a. The Chancellor held that the increase in the exchange ratio was "a reasonable and fair resolution of

the claims that are being given up," and approved the settlement. Pet. Ap. C at 30a.

On November 27, 2001, petitioner's counsel filed a notice of appeal in the Supreme Court of Delaware, challenging the settlement on a number of grounds, including the adequacy of the exchange ratio and of the Chancellor's determination that the named plaintiffs and their counsel adequately represented the class. The Supreme Court of Delaware considered petitioner's brief and oral argument on those issues, and, as to the adequacy of the class representative, explicitly held:

> We have held that the Court of Chancery's determination of the adequacy of a class representative is an "essential component" of the settlement approval process. The Chancellor clearly addressed this issue both from the bench and in his final order approving the settlement, explicitly stating that the shareholder class had been adequately represented. Although Fernandes cites deposition testimony taken from class counsel that suggests limited contact and substantially passive involvement by certain named plaintiffs, a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy. Our case law requires little more than that a representative be generally familiar with the litigation. Indeed, our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings. Therefore, the mere fact that class counsel undertook the dominant role in this litigation in no way suggests that the class representatives must be found to have inadequately represented the class. We find that sufficient evidence exists in the record to support the Chancellor's conclusions on the adequacy of the named plaintiffs' representation.

Pet. Ap. A at 9a (citations in footnotes omitted).

Here, petitioner has not challenged the fairness of the settlement. She seeks review solely on the question of whether the class representative and co-lead counsel adequately represented the class in accordance with the requirements of the Due Process Clause of the United States Constitution. For the reasons set forth below, the petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

The Delaware Courts Fully Considered And Properly Determined That The Plaintiff Adequately Represented The Class.

Although petitioner argues that a writ of certiorari should be granted to resolve a dispute among federal appellate courts concerning the standard by which the adequacy of a class representative is to be measured, in reality there is no such dispute and the petition simply presents for review a narrow issue of fact that was properly decided by the Delaware Court of Chancery and affirmed by the Supreme Court of Delaware.

Contrary to petitioner's argument, there is no split among the federal circuits as to the standards that are applied to determine the adequacy of a class representative. All courts recognize the importance of determining the adequacy of the class representative to ensure that due process is afforded to absent class members. In doing so, the lower courts review the factual record to ensure that: (1) the interests of the class representative are not antagonistic to the other members of the class; and (2) the class is represented by competent counsel. *See, e.g.*, 5 Moore's Federal Practice § 23.25[3][a] (3d ed. 1997); *In re Fuqua Industries, Inc. S'holder Litig.*, 752 A.2d 126, 132-33 (Del. Ch. 1999) (noting that the requirements that: (a) the plaintiff not have interests antagonistic to those of the class; and (b) the plaintiff's attorney be qualified, experienced and generally able to conduct the proposed litigation are sufficient to have adequate representation). Although petitioner's counsel suggests that

the circuit courts may differ on the question of who bears the burden of proof where the adequacy of a class representative is questioned, that question is not raised here. *See* Pet. at 7-8; 5 Moore's Federal Practice § 23.25[3][c] ("Courts have disagreed as to which party has the burden on proving adequacy of representation under Rule 23 (a)(4) . . . .").

There is no question that the determination of the adequacy of a class representative is a factual issue that depends upon the circumstances of each case and is only reversed for abuse of discretion. *See, e.g.*, 5 Moore's Federal Practice § 23.25[3][b]; Wright & Miller, Federal Practice and Procedure: Civil 2d § 1765 at p. 271 (2d ed. 1990). In this case, the Delaware Court of Chancery expressly recognized and fulfilled its obligation to ensure that the due process requirements embedded in Rule 23 of the Court of Chancery Rules were met. Pet. Ap. C at 22a-23a. The Chancellor reviewed the factual record before him, including briefs, oral argument and affidavits, which showed that: (1) the lead plaintiffs' interests were aligned with the members of the Class;[1] and (2) that plaintiffs' co-lead counsel were experienced and fully represented the interests of the class. Pet. Ap. C. at 23a.

In determining the adequacy of the class representative, the Chancellor expressly considered and rejected petitioner's argument that the named plaintiff did not adequately represent the class "because he was not involved in settlement

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[1] Petitioner herself would likely have failed to qualify as an adequate class representative because she purchased shares *after* the tender offer was announced and *after* settlement had been reached. *See Leighton v. Lewis*, 577 A.2d 753 (Del. 1990) (Table) (affirming Court of Chancery decision that plaintiff lacked standing to intervene where plaintiff did not buy stock until after the alleged wrongdoing had occurred). The Court of Chancery did not find it necessary to reach the standing issue here, however, in approving the settlement because it treated petitioner as if she had standing for purposes of deciding the objection.

discussions, but instead was 'notified' about the settlement at the time it was reached."[2] Pet. at 4. As the Chancellor noted, the sworn testimony submitted by plaintiffs' co-lead counsel in support of the settlement specifically stated that in this case:

- lead counsel regularly consulted with the lead plaintiff;
- lead counsel discussed the proposed terms of the settlement with the lead plaintiff *before* an agreement in principle on the terms of the settlement was reached; and
- the lead plaintiff authorized counsel to settle the litigation on the proposed terms.

Pet. Ap. C at 23a; *See also* Resp. Br. App. B.

Thus, the very factual predicate of the petition is incorrect. The courts below did *not* find (much less approve) that co-lead counsel failed to inform or involve their client in the litigation until after a settlement was reached.

Moreover, in reviewing the issue of the adequacy of representation on appeal, the Supreme Court of Delaware expressly recognized (in portions of its opinion that petitioner omitted from the quotations in her petition) that:

- the Court of Chancery's determination of the adequacy of a class representative is an "essential component" of the settlement process;[3]

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[2] Petitioner's argument that the class representative was inadequate because one of the lawyers serving as co-lead counsel (Arthur N. Abbey) did not personally speak with the lead plaintiff is specious. Here, the record is unrefuted that a lawyer from the other firm serving as co-lead counsel had regular, direct contact with the lead plaintiff, who was briefed on the terms of the proposed settlement *before* an agreement in principle on settlement terms was reached. *See* Resp. Br. App. B.

[3] Pet. Ap. A at 9a (citing *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1045 (Del. 1996)).

- the Chancellor clearly addressed the adequacy of representation issue both from the bench and in his final order approving the settlement explicitly stating that the shareholder class had been adequately represented; and
- sufficient evidence exists in the record to support the Chancellor's conclusions on the adequacy of the named plaintiffs' representation.

Pet. Ap. A at 9a-10a.

Thus, the Supreme Court of Delaware determined that the Court of Chancery properly applied the standard for determining the adequacy of the class representative in accordance with the requirements of the Due Process Clause. That is all that the Delaware courts were required to do. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) ("state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed for federal law").

Here, the absent class members' due process rights were appropriately protected by the Court of Chancery's careful review and approval of the settlement. Regardless of whether some courts have placed more or less emphasis on the level of knowledge of the named plaintiff in making *factual determinations* concerning the adequacy of a class representative, in this case the Delaware Court of Chancery expressly found, and the Supreme Court of Delaware affirmed, that the class representative had sufficient involvement in the proceedings to adequately function as the class representative. As this Court stated in *Hansberry v. Lee*, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it." 311 U.S. 32, 42 (1940). In this case, the procedure followed by

the Delaware Court of Chancery and affirmed by the Supreme Court of Delaware ensured the protection of absent parties and need not be addressed on appeal to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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